

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

Wisconsin Resources Protection
Council, Center for Biological
Diversity, and Laura Gauger,

Plaintiffs,

Case No: 11-cv-45

v.

Flambeau Mining Company,

Defendant.

**DECLARATION OF STEPHEN V. DONOHUE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Stephen V. Donohue declares as follows under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I previously provided a Declaration in this matter on November 21, 2011, which provided, among other things, my background, experience, and expertise. As indicated in that Declaration, I have acted as a consultant to Flambeau Mining Company (“Flambeau”) since the mid-1990s.

2. I make these statements based on personal knowledge and experience.

3. In addition to the materials I stated I reviewed in my November 21, 2011 Declaration, I have also reviewed various deposition transcripts in this matter.

4. In 2007, Flambeau was granted a Certificate of Completion (“COC”) for 149 acres of the Flambeau Mine Site that includes the backfilled mine. The acreage of the Mine Site that was not covered by the COC was 32 acres and included the Industrial Outlot. The Industrial Outlot is approximately 28 acres and additional acreage not

included in the COC is outside of the Industrial Outlot. The watershed for the biofilter does not include the entire Industrial Outlot and is approximately 21 acres.

5. The outlet of the biofilter is into a grassy wetland area. This area drains to the south through a culvert beneath Copper Park Lane before eventually reaching the visible occurrence of Stream C.

6. To date, no definitive test has been completed demonstrating: 1) that intermittent overflow from the biofilter that may flow into the wetland area reaches the visible occurrence of Stream C south of Copper Park Lane; or 2) that even if one accepts that a Stream C channel exists east of the biofilter, that overflow from the biofilter reaches that channel. Moreover, there has been no definitive test or documentation demonstrating that the intermittent overflow from the biofilter has ever reached the Flambeau River. This demonstration could be completed through hydrologic studies such as a dye test. To my knowledge such hydrologic testing has not been completed.

7. Flambeau undertook three significant remedial actions in the Industrial Outlot area since the mine was reclaimed. The first began in 2003 and was completed on June 18, 2004. The second began in May 2006 and was completed on June 30, 2006. A third remedial action was undertaken in 2008 in the roadside ditch north of Copper Park Lane but this activity was outside of the watershed the biofilter serves.

8. Since completion of the second remedial action, all stormwater flowing to the inlet of the biofilter is derived from stormwater contact with natural materials such as vegetated native topsoil, the paved parking lot and roads, or limestone drainage ditch. Documented remediation activities substantiate that stormwater flowing into and from the biofilter does not contact any overburden raw material, intermediate product (such as crushed ore), finished product, by-product or waste material at the Flambeau mine. All

of these materials were either removed, isolated from contact with stormwater, or never existed at the site.

9. Title V of the Clean Water Act, the definition of “pollutant” is described at Section 502 (33 U.S.C. 1362) to mean:

“...dredge spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.”

Those materials either do not exist at the site or have been isolated from contact with stormwater as a result of documented reclamation and remediation activities. Therefore, since the completion of remediation activities, stormwater does not contain copper and zinc added from any of the materials described in the statutory definition of a pollutant. As such any occurrence of metals such as copper, iron and zinc in stormwater runoff from the Industrial Outlot cannot be considered to be a pollutant.

10. As part of the 2006 remediation effort, soil and surface water samples were obtained on April 5, 2006 from the offsite locations in ditches along Highway 27 approximately one mile north and one south of the site. An examination of that data shows that the concentrations of copper in surface soils at the Industrial Outlot, upstream of the biofilter, ranged between 20 and 27 mg/kg. Other offsite concentrations of copper in soils (encompassing areas along Highway 27, the former rail spur east of Highway 27 and sites around Ladysmith) ranged between 4.4 and 180 mg/kg.

11. Concentrations of copper in soils collected in the ditch along Highway 27 north and south of the mine site ranged between 12 and 85 mg/kg with an average concentration of 30 mg/kg.

12. The concentration of metals in soil samples collected at the mine site are similar to the concentration of those metals in soil samples collected off site, and upstream of the biofilter, and along Highway 27 at sample sites north and south of the former mine site.

13. This data demonstrates that metals such as copper, iron and zinc in the soils at the Flambeau mine site are comparable to naturally occurring levels of those substances in the vicinity of the Flambeau mine site.

14. The concentration of metals in stormwater near the biofilter outlet is similar or lower than concentrations in stormwater in the Stream C watershed upstream of the biofilter outlet area.

15. The concentration of copper and zinc in water collected along Highway 27 north and south of the mine site (outside of the Stream C watershed) is typically higher than what emanates from any overflow of the biofilter.

16. A significant source of metals in Stream C south of Copper Park Lane, emanates from an area where drainage from the Stream C watershed flows beneath Highway 27 upstream of the biofilter outlet area.

17. Surrogate monitoring data shows that the concentration of copper and zinc along highways and in small streams receiving wetland drainage, is similar to that occurring at the Flambeau mine site and similar to that which occurs in the intermittent overflow from the biofilter.

18. Based on monitoring data, the concentration of metals in stormwater at the Biofilter outlet are routinely similar or lower in concentration than stormwater flowing into Stream C from the watershed upstream of the biofilter outlet area. Based on this, any flow from the biofilter cannot, and does not, cause an increase in the concentration of

metals in the surface water in Stream C. The concentration of metals in Stream C south of the biofilter area would be similar to historical data due to the sources that exist along Highway 27 regardless of whether any overflow from the biofilter reached Stream C. This conclusion is substantiated by Department data collected in a tributary to Stream C, which is in a watershed that is not affected by the Flambeau Mine Site. This tributary exhibits nearly identical concentrations to the biofilter outlet and drains a watershed area that is not affected by the Flambeau Mine Site and is nearly double that of the Industrial Outlot.

19. As part of the monitoring undertaken near the Flambeau Mine, sandpoints were installed in the bed of Stream C. All of the sandpoints except one showed that Stream C is consistently losing water to the shallow aquifer. This means that not all of the water entering Stream C reaches the Flambeau River. Rather, some of it enters the groundwater before Stream C reaches the Flambeau River.

20. The copper concentration on any given day at the Biofilter inlet is not an indication of how much copper flows out of the Biofilter outlet on the next day.

21. No test data exists to establish that copper from the biofilter enters Stream C.

22. No test data exists to establish that zinc from the biofilter enters Stream C.

23. The test data that does exist is insufficient to establish that measured copper levels in Stream C cause or contribute to a measureable increase in the copper levels in the Flambeau River.

24. The test data that does exist is insufficient to establish that measured zinc levels in Stream C cause or contribute to a measureable increase in the zinc levels in the Flambeau River.



Stephen V. Donohue

December 7, 2011

Date